87-1833

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE STATE OF FLORIDA

Petitioner,

vs.

CHARLES SLAPPY

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF OF PETITIONER ON JURISDICTION

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QUESTION PRESENTED

WHETHER THE OPINION OF THE SUPREME COURT OF FLORIDA IS IN CONFLICT WITH BATSON V. KENTUCKY, 476 U.S. 79, 106 S.CT. 1712, 90 L.ED.2D 69 (1986) WHERE IT DID NOT GIVE APPROPRIATE DEFERENCE TO THE FINDING OF THE TRIAL COURT THAT THE REASONABLE, RACE NEUTRAL REASONS GIVEN FOR THE EXCERCISE OF PEREMPTORY CHALLENGES REFUTED ANY PRIMA FACIE CASE OF RACIAL DISCRIMINATION?

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I
OPINION BELOW

The opinion of the Supreme Court of Florida accepting conflict jurisdiction and approving the opinion of the Third District Court of Appeal of Florida is reported at 13 F.L.W. 184 (Fla. Mar. 10, 1988) (A. 32-59).

The opinion of the Third District Court of Appeal of Florida on Respondent's direct appeal of the trial court's Judgment and Sentence is reported at Slappy v. State, 503 So.2d 350 (Fla. 3d DCA 1987)(A. 1-31). Rehearing was denied by the Third District on March 20, 1987 (A. 32).

The Judgment and Sentence of the trial court, the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, it unreported.

II

JURISDICTION

The jurisdiction of this court is invoked pursuant to the provisions of Rule 17 (c) of the Rules of the Supreme Court of the United States and 28 U.S.C. §1257 (3). The opinion of the Supreme Court of Florida was filed on March 10, 1988. (A. 32-59).

III

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The applicable provisions of the United States Constitution read as follows:

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The applicable provisions of the Constitution of the State of Florida read as follows:

ARTICLE I

* * *

SECTION 16. Rights of accused.- In all criminal prosecutions the accused shall, upon demand, br informed of the nature and cause of the accusation against him, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed. If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient; but before pleading the accused may elect in which of those counties he will be tried. Venue for prosecution of crimes committed beyond the

boundaries of the state shall be fixed by law.

IV

STATEMENT OF THE CASE

The respondent was charged in the Circuit Court of Dade County, Florida with Carrying a Concealed Firearm. (A. 2, 33). The State, during jury selection, exercised four (4) of its six (6) peremptory challenges against black venirepersons (A. 3), leaving one (1) black person on the six-person jury (A. 56). The defense objected to the first three (3) of these challenges and, upon the fourth challenge of a black person, the court, sua sponte, requested the reasons for the challenges, as follows:

> **THE COURT:** All right. At this particular juncture Ms. Lumpkin is the fourth black juror excused by the state.
>
> State, why are you excusing Ms. Lumpkin?

ASSISTANT STATE ATTORNEY: She said she thinks she knew [the defense counsel] from previously in her response. Whether or not she did or did not--I don't want someone on a defense--

THE COURT: Why did you excuse Ms. Jordan?

ASSISTANT STATE ATTORNEY: She didn't seem to be secure about sitting on a jury. She asked questions, I think, twice, whether or not she needs to know anything about the law or criminal justice system. Her health doesn't seem to be very good. I just didn't want someone like that on the jury.

THE COURT: How about Mr. Williams?

ASSISTANT STATE ATTORNEY: Both Mr. Williams and Mrs. Williams I excused because they're both teachers, assistant teachers, and both of them at elementary schools. That to me indicates a degree of liberalism that I prefer not have on a jury.

THE COURT: Liberalism?

ASSISTANT STATE ATTORNEY: Yeah, maybe more sympathetic to people who go astray than

people who don't have to deal with kids in a classroom. Always getting into trouble.

DEFENSE COUNSEL: Of course. They accepted Mr. Farrar, who is also a teacher, and I excused him.

ASSISTANT STATE ATTORNEY: He was also in the army.

THE COURT: You never heard of liberals in the army?

ASSISTANT STATE ATTORNEY: I think you are less likely to find help in the military than elementary school.

(A. 6-8).

The trial court found the explanations given to be reasonable (A. 8), accepted them, and denied the subsequent motion, by the defense, to strike the panel. (A. 8).

The defendant was, subsequently, tried by the jury, found guilty, and

sentenced to eighteen (18) months probation. (A. 2).

The defense appealed, alleging that three (3) of the State's challenges were racially motivated (the challenge of Mrs. Lumpkin was not claimed to have been racially motivated.) (A. 4-5).

The Third District Court of Appeal reversed, holding that trial courts were to apply five (5) factors which should be weighed heavily against the legitimacy of any race-neutral explanation, as follows:

> 1) an explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically; 2) no examination or only a perfunctory examination of the challenged juror; 3)

> disparate examination of the challenged juror, i.e., questioning challenged venireperson so as to evoke a certain response without asking the same question of other panel members; 4) the reason given for the challenge is unrelated to the facts of the case; and 5) disparate treatment where there is no difference between responses given to the same question by challenged and unchallenged venirepersons.
>
> (A. 24).

The court held that the challenges concerned did not meet the five (5) factor test because the reason for the challenge of Mrs. Jordan (her questions and appearance of ill health) was not the subject of voir dire examination by the prosecution. (A. 25). The Williams (Mr. and Mrs. Williams) were challenged based, according to the court, on an assumed employment group bias not shown to apply to either juror, specifically

(A. 25). The court also held that treating a high school teacher differently from two (2) elementary teacher's assistants based on his experience as an infantry veteran was apparent disparate treatment. (A. 25-26). It also held that the fact that the record failed to show what liberalism was, in this context, or how it would affect an ability to follow the law in a concealed firearms case supported its decision, as did the lack of evidence that ". . . liberalism plaques school teachers peculiarly or that it may be cured by a stint in the army." (A. 26).

The Supreme Court of Florida accepted discretionary review of the case. (A. 32). It held that, although the State's explanations were race

neutral and reasonable that it failed to satisfy its burden of proof of demonstrating that there was record support for the reasons given and that the reasons were not pretextual. (A. 40-57). It held that failure to establish that the Williams were liberal or that Mrs. Jordan was, in fact, in ill health were fatal (A. 52-56) and approved the decision of the Third District. (A. 32, 57).

V

REASONS FOR GRANTING CERTIORARI

PROPOSITION I

The opinion of the Supreme Court of Florida is in conflict with Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L. Ed.2d 69 (1986) where it held that the trial court's acceptance of reasonable, race-neutral reasons for the exercise of peremptory challenges was reversible error where the trial court did not apply a nonexclusive list of five (5) factors to be weighed heavily against the legitimacy of any race neutral explanation.

This court held, in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), that once the prosecutor has articulated a neutral explanation related to the particular case to be tried, "The trial court will then have the duty to determine if the defendant has established purposeful

discrimination.[21]" Batson v. Kentucky, 90 L.Ed.2d 69, 88-89 (1986). footnote 21 states:

> In a recent Title VII sex discrimination case, we stated that "a finding a intentional discrimination is a finding of fact" entitled to appropriate deference by a reviewing court. Anderson v. Bessemer City, 470 U.S.____, 84 L.Ed.2d 518, 105 S.Ct. 1504 (1985). Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference. Id., at ____, 84 L.Ed.2d 518, 105 S.Ct. 1504.

Subsequently, this has been held to mean that a determination by the trial judge that the prosecution's peremptory challenges were not motivated by intentional discrimination may only be reversed if it is clearly erroneous.

Germane v. Heckler, 804 F.2d 366, 368 (7th Cir. 1986); United States v. Matthews, 803 F.2d 325, 330 (7th Cir. 1986); cert. granted on other grounds, 107 S.Ct. 1601, 94 L.Ed.2d 788 (1987); See, United States v. Cloyd, 819 F.2d 836, 837 (8th Cir. 1987); United States v. Love, 815 F.2d 53, 55 (8th Cir. 1987); cert. denied, 108 S.Ct. 147, 98 L.Ed.2d 130 (1987).

Although the case that resulted in the decision concerned herein, State v. Neil, 457 So.2d 481 (Fla. 1984) purported to rest on Article I, Section 16 of the Constitution of the State of Florida, the section guaranteeing an impartial jury (as it may, well), the opinion concerned in this case rests squarely on the grounds of Batson and,

therefore, the equal protection clause of the Fourteenth Amendment. Batson is cited eleven (11) times by the Supreme Court of Florida in support of this decision and the opinion of the Third District is specifically found to be in harmony with Batson. (A. 51). Indeed, the equal protection clause of the United States Constitution, which has no Florida equivalent, is specifically relied upon in support of the court's opinion. (A. 43). Further, the author of the Neil opinion, Chief Justice McDonald, specifically stated, in his dissenting opinion, that the opinion in this case is inconsistent with Neil because there is no evidence that the trial court abused its discretion in the evaluation of the reasons given for the exercise of peremptory challenges. (A. 57-59).

The inconsistencies between this case and Batson may be illustrated by the fact that the appearance of ill health in a disabled widow may not be held to be a bona fide reason for a peremptory challenge, no matter how severe the obvious symptoms are, unless the challenging attorney risks offending the venire by asking personal questions concerning her health. (A. 55). Indeed, even then, the challenge of that juror would be grounds for reversal on the grounds of disparate examination (the third factor) unless each of the venire persons were similarly examined concerning their health. (A. 49).

Further, the opinion of the Third District, approved by the Supreme Court of Florida, holds that the California

cases holding that demonstrated specific bias of the juror is the only permissible reason for exercising peremptory challenges". . .give meaning to the requirements of Neil v. State and Batson v. Kentucky. . . ." (A. 23).

There is certainly no question of the decision in this case resting on adequate and independent state grounds where the Supreme Court of Florida never so stated, in its opinion and where the Batson decision, interpreting the equal protection clause of the Fourteenth Amendment to the United States Constitution is relied upon more heavily than any other case for support. (A. 32-57).

It is, therefore, clear that the opinion of the Supreme Court of Florida, in this case, is directly in conflict with the Batson decision of this court. See, South Dakota v. Neville, 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983).

VI

CONCLUSION

This Court is therefore urged to accept certiorari jurisdiction over this case to resolve the conflict concerned in the instant issues of compelling national importance.

RESPECTFULLY SUBMITTED, on this_____ day of _____, 1988 at Tallahassee, Florida.

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CERTIFICATE OF SERVICE

I, **CAROLYN M. SNURKOWSKI**, Esquire, counsel and a member of the Bar of the United States, hereby certify that on the _____ day of _____, 1988, I served three (3) copies of the Brief of the Petitioner on Jurisdiction, filed pursuant to Supreme Court Rule 22.6, on MICHAEL H. TARKOFF, ESQ., Flynn and Tarkoff, 1414 Coral Way, Miami, Florida 33145, by a duly addressed envelop with postage paid.

CAROLYN M. SNURKOWSKI
Assistant Attorney General
Counsel for Petitioner

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APPENDIX TO BRIEF OF PETITIONER ON JURISDICTION

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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

JANUARY TERM, A.D. 1987

CASE NO. 85-1530

CHARLES SLAPPY,)

Appellant,)

vs.)

THE STATE OF FLORIDA,)

Appellee.)

Opinion filed February 3, 1987.

An Appeal from the Circuit Court for Dade County, Gerald Kogan, Judge.

Bennett H. Brummer, Public Defender, and Michael H. Tarkoff, Special Assistant Public Defender, for Appellant.

Robert A. Butterworth, Attorney General, and Charles M. Fahlbusch, Assistant Attorney General, for Appellee.

Before BARKDULL, FERGUSON and JORGENSON, JJ.

FERGUSON, Judge.

The defendant appeals from an order withholding adjudication and placing him on probation, entered upon a jury vedict finding him guilty of carrying a concealed firearm. Charles Slappy, a black man, contends that the trial court did not follow the dictates of State v. Neil, 457 So.2d 481 (Fla. 1984), when it accepted, at face value, the state's explanation offered to rebut the presumption that peremptory challenges were being used to systematically exclude members of his race from the jury. We agree and reverse.

State v. Neil, which requires an explanation of a party who has used the peremptory challenge in an apparently discriminatory fashion, also places an affirmative duty on the trial court to

critically evaluate the proffered explanation and to reject any race-neutral explanation which is not bona fide. The central question here is whether the State made a bona fide showing that its use of the peremptory challenges was for reasons other than race.

During jury selection the State exercised all six of its peremptory challenges. Four of those challenges were exercised against black venire-persons: Oppie Jordan, Rhonda Lumpkin, Mary Ellen Williams, and Frank Williams.

Mrs. Jordan is a disabled widow. The only questions directed to her specifically during voir dire were whether she had ever served as a juror

in a criminal case, whether she could be a fair juror in this case and whether she understood the principles of "presumption of innocence" and "proof beyond a reasonable doubt." She responded that she had previously served as a juror in a civil case and that she could be a fair juror with a better understanding of the case.

Mrs. Lumpkin is a dispatch clerk for the telephone company. When asked about prior involvement in the court system, she stated that she had served as a juror in a criminal case and that she believed counsel for the defendant in this case was one of the lawyers involved in that earlier case.[1]

---

[1] The defendant does not claim here

(Continued)

As to Mrs. Williams, questioning by the court and defense counsel disclosed that she was an elementary school teacher's aid, married to a security guard and that she was afraid of guns. She responded that she could nevertheless be a fair juror even though the case involved a firearm.

Frank Williams is also a teacher's assistant in an elementary school. In response to questions by the court and defense counsel, Mr. Williams answered that he was once selected as a juror in a civil case and that he understood the difference between "preponderance of evidence" and "reasonable doubt."

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that the exclusion of Mrs. Lumpkin was racially motivated.

The State exercised four of its six challenges to exclude black members of the prospective jury panel. After the fourth black juror was excused by the State, over the defendant's objection, the court, obviously satisfied that a prima facie showing was made that the State was excluding jurors based on race, ordered the prosecutor to explain his reasons for the peremptory challenges. The exchange between the court and the counsel was as follows:

> THE COURT: All right. At this particular juncture Ms. Lumpkin is the fourth black juror excused by the state.
>
> State, why are you excusing Ms. Lumpkin?
>
> ASSISTANT STATE ATTORNEY: She said she thinks she knew [the defense counsel] from previously in her response. Whether or not she did or did not--I don't want someone on a defense--

THE COURT: Why did you excuse Ms. Jordan?

ASSISTANT STATE ATTORNEY: She didn't seem to be secure about sitting on a jury. She asked questions, I think, twice, whether or not she needs to know anything about the law or criminal justice system. Her health doesn't seem to be very good. I just didn't want someone like that on the jury.

THE COURT: How about Mr. Williams?

ASSISTANT STATE ATTORNEY: Both Mr. Williams and Mrs. Williams I excused because they're both teachers, assistant teachers, and both of them at elementary schools. That to me indicates a degree of liberalism that I prefer not have on a jury.

THE COURT: Liberalism?

ASSISTANT STATE ATTORNEY: Yeah, maybe more sympathetic to people who go astray than people who don't have to deal with kids in a classroom. Always getting into trouble.

DEFENSE COUNSEL: Of course. They accepted Mr. Farrar, who is also a teacher, and I excused him.

> ASSISTANT STATE ATTORNEY: He was also in the army.
>
> THE COURT: You never heard of liberals in the army?
>
> ASSISTANT STATE ATTORNEY: I think you are less likely to find help in the military than elementary school.

With a hint of frustration -- as if legally obligated to accept the State's explanation -- the trial judge concluded his questioning:

> THE COURT: Anyhow, I made the inquiry.

The defendant moved to strike the entire jury panel. The court denied the motion, finding that the prosecutor's stated reasons for excluding the four black jurors were "reasonable."

It is significant to this examination that the prosecutor never asked Mrs. Jordan any question regarding her understanding of the proceedings or reflecting on her ability to understand the court's instruction on the law. Nor did he inquire about her health, generally, or question whether she suffered from any physical or mental condition which might impair her ability to serve as a juror. As to Mrs. Williams and Mr. Williams, school teacher aides, the prosecutor asked no questions during voir dire.

This is one of the first cases since Neil was decided just a year ago to focus on the trial judge's responsibility with respect to explanations given by a prosecutor who has been

ordered to rebut the presumption that peremptory challenges are being exercised to exclude prospective jurors solely on the basis of ethnicity. There has been even less time for cases in the federal courts presenting the same question to wind through the appellate process since the United States Supreme Court decided the recent case of Batson v. Kentucky, ____U.S._____, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), which eased the burden of a criminal defendant to show that a prosecutor is using the peremptory challenge to systematically exclude a member of his minority group.

California, in People v. Wheeler, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978), was the first state to place constitutional restraints on the

exercise of the peremptory challenge. The question presented in this appeal has been before the California Supreme Court on four occasions. We may take guidance from that court's experience and its constitutionally sound resolution of the question.[2]

In People v. Hall, 35 Cal.3d 161, 197 Cal.Rptr. 71, 672 P.2d 854 (1983), the court reviewed a case where the prosecutor had used five of eight peremptory challenges to exclude all black prospective jurors. Concluding

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[2] People v. Johnson, 22 P.2d 296, 148 Cal.Rptr. 915, 583 P.2d 774 (1978), is not included in the discussion which follows. The prosecutor's explanation in Johnson, that he purposefully excluded all black jurors because the evidence at trial would show that one of the State's key witnesses was heard to refer to the defendant in a racially derogatory manner, was held insufficient.

that the trial court committed error in failing to determine whether race was a factor in the prosecutor's exercise of peremptory challenges to remove blacks from the jury, Hall's conviction was reversed and the case was remanded for a new trial. With regard to the trial judge's responsibility, the supreme court reiterated:

> [I]t is imperative, if the constitutional guarantee is to have real meaning, that once a prima facie case of group bias appears the allegedly offending party be required to come forward with [an] explanation to the court that demonstrates other bases for the challenges, and that the court satisfy itself that the explanation is genuine. This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his obervations of the

> manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily, for "we rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination."

Hall, 35 Cal.3d at 167, 197 Cal.Rptr. at 75, 672 P.2d at 858 (citation omitted). In Hall the prosecutor, volunteering reasons for removing two black jurors, explained that one had children the same age as the defendant and that the other had family members in Texas, whereas the defendant had had some contact with the state of Texas while in military service. The supreme court noted that several unchallenged nonblack jurors also had children the defendant's age and that none of them were questioned about possible Texas

connections. Such disparate treatment, the court held, was strongly suggestive of bias and could in itself have warranted the conclusion that the peremptory challenge was being exercised for impermissible reasons. People v. Hall, 35 Cal.3d at 168, 197 Cal.Rptr. at 76, 672 P.2d at 858.

In People v. Trevino, 39 Cal.3d 667, 217 Cal.Rptr. 652, 704 P.2d 719 (1985), the California Supreme Court again considered the question, this time in a case where the prosecutor had exercised its peremptory challenges to remove all six venirepersons with "Spanish surnames." Finding a prima facie case of abuse of the peremptory challenge, the trial court ordered the prosecutor to give explanations. After

listening to the reasons offered, the trial court denied Trevino's motion for a mistrial, stating:

> [The prosecutor] has sustained his burden of justification that the use of the peremptory challenges against these particular jurors was for specific reasons which he explained on the record; [n]ot that they were necessarily members of a certain ethnic group, but because of their particular age or sex, he excused them for those reasons and other specific reasons such as with one juror he mentioned the fact that he had a relative convicted of [a] similar offense or a crime. And these explanations seem to fall within the reasonable use of the peremptory challenges for bias or implied bias that counsel might want to use. For that reason the motion would be denied.

Trevino, 39 Cal.3d at 688-89, 217 Cal.Rptr. at 663, 704 P.2d at 730.

The supreme court reversed, first noting that the trial court was apparently confusing "specific reason" with "specific bias." The latter, a permissible basis for exclusion of a prospective juror, was defined in Wheeler as "a bias relating to the particular case on trial on the parties or witnesses thereto." Wheeler, 22 Cal.3d at 276, 148 Cal.Rptr. at 902, 583 P.2d at 760. Further, a review of the record demonstrated that the prosecutor had not, in fact, satisfied his burden of showing that he excluded the Spanish surnamed jurors on the grounds of specific bias.

Although the prosecutor had relied on age as the most compelling factor underlying his use of peremptory

challenges-- voicing a concern that the young jurors lacked maturity and might be the same age as the defendant -- he made no effort to determine the jurors' ages on voir dire. Nor did he inquire into any age-based biases the jurors might harbor. Moreover, the prosecutor did not challenge another prospective juror whose surname was not Spanish even though he was about the same age as the defendant. The disparate treatment of members of the excluded group and the unchallenged jurors guided the supreme court's analysis.

The latest California case to consider the question is People v. Turner, 42 Cal.3d 711, 230 Cal.Rptr. 656, 726 P.2d 102 (1986), which relied on both Wheeler and Batson v. Kentucky,

the recent United States Supreme Court case. There, the California Supreme Court agreed that the state's stated reasons for using peremptory challenges against black jurors were constitutionally insufficient.

In Turner the defendant made a motion for mistrial after the prosecutor used two of his first five peremptory challenges to strike the only black prospective jurors. Their backgrounds and views suggested that they would have been acceptable to the prosecutor had they been white: both had been victims of crimes, and one was a friend of a policeman. After the black venirepersons had been replaced by whites, the prosecutor accepted the panel. The defense then exercised a challenge

against a member of the panel and another black was seated. After voir dire, the state "passed for cause" but then immediately exercised a peremptory challenge to strike the newly seated black woman from the panel, leaving an all white jury. The prosecutor did not use any of his remaining six peremptory challenges.

As justification for striking the first black juror the prosecutor explained that the case was based on circumstantial evidence and complicated instructions for which the juror was not suited because he was a truck driver. Noting first that the explanation evidenced an impermissible group bias, the supreme court rejected it for the further reason that the record refuted

any implication that the juror lacked the necessary intelligence.

In explaining the challenge to the second black juror the prosecutor said:

> I don't remember exactly, but I think it was something in her work as to that she was doing that from our standpoint, that background was not -- would not be good for the People's case. And I excused her, along with quite a few other people, too, for the same reason.

Turner, 42 Cal.3d at ___, 230 Cal.Rptr. at 664, 726 P.2d at 110. The record showed that the juror was employed as a hospital administrator and that the prosecutor had not asked any questions about her employment. Rejecting the explanation, the supreme court said it amounted to virtually no explanation.

It was also noted that the juror who was selected foreman was married to a registered nurse.

In response to the court's question on voir dire, the third black juror said that as a mother she would find sitting as a juror in the murder case very emotional. The court's final question to her on voir dire was "Do you think, Miss Shepherd, you could listen to the evidence in this case, the instructions of law, and attempt to reach a just verdict based on the facts as you understand them to be and the law as I state it to you?" Turner, 42 Cal.3d at ____, 230 Cal.Rptr. at 665, 726 P.2d at 111. Her answer was in the affirmative. Although neither counsel followed up the court's voir dire, the

prosecutor's justification for the challenge was the juror's alleged statements "that she could not sit impartially because she was mother of children."

That explanation was held insufficient by the California high court. It ruled that the juror's statement that she would find the case very emotional may well have meant only that she was uncomfortable with the nature of the case -- a feeling that was also expressed by other jurors. At the least, said the court, the remark called for a few follow-up questions that would have clarified the statement; therefore, little confidence could be placed in the proffered explanation. On this point, the court quoted in part from its earlier holding in Wheeler:

A prosecutor's failure to engage Black prospective jurors "in more than desultory voir dire, or indeed to ask them any questions at all," before striking them peremptorily, is one factor supporting an inference that the challenge is in fact based on group bias.

People v. Turner, 42 Cal.3d at ___, 230 Cal.Rptr. at 665, 726 P.2d at 111 (quoting People v. Wheeler, 22 Cal.3d at 281, 148 Cal.Rptr. at 905, 583 P.2d at 764).

In summary the California cases give meaning to the requirements of Neil v. State and Batson v. Kentucky. After a presumption arises that a party has used its peremptory challenges to exclude prospective jurors on the basis of race, the offending party must articulate "legitimate reasons" which are "clear and reasonably specific" and

which are "related to the particular case to be tried." The following will weigh heavily against the legitimacy of any race-neutral explanation: 1) an explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically; 2) no examination or only a perfunctory examination of the challenged juror; 3) disparate examination of the challenged juror, i.e., questioning challenged venireperson so as to evoke a certain response without asking the same question of other panel members; 4) the reason given for the challenge is unrelated to the facts of the case; and 5) disparate treatment where there is no difference between responses given to the same question by challenged and unchallenged venirepersons.

The explanation given for the challenge of Mrs. Jordan was not the subject of any voir dire examination by the prosecution nor were the reasons given for the challenge specific or legitimate. The explanations given for the challenges to Mrs. Williams and Mr. Williams were also based on an assumed employment group bias, which was not shown to apply to either juror specifically or to the facts of the particular case. That the prosecutor intended, unlawfully, to exclude the teacher aides on the basis of race alone is strongly inferred from the fact that they were challenged without being examined on voir dire and that a nonblack schoolteacher was not challenged.

Although liberalism is, according

to the prosecutor, a trait antagonistic to the state's interest and common to schoolteachers, a white schoolteacher, Mr. Farrar, was not challenged by the state. The reason for the apparent disparate treatment, according to the prosecutor, is that military experience might have purged Mr. Farrar of liberal ideology. The trial court was understandably troubled with the idea. It is not shown by the record what liberalism is in this context or how it affects an ability to follow the law in a concealed firearm case. There is also a want of evidence that liberalism plagues school teachers peculiarly or that it may be cured by a stint in the army.

The error in this case, as it was in Hall is that the trial court apparently considered itself bound to accept all of the prosecutor's explanations at face value. That view, said the California Supreme Court, would constitute an abdication of obligations imposed by the constitution. People v. Hall, 35 Cal.3d at 169, 197 Cal.Rptr. at 76, 672 P.2d at 858-59.

At the time of trial the trial judge was certainly without guidance in Florida or federal law on the precise question. We hold now that it is not sufficient that a prosecutor's explanations, in meeting the presumption that the peremptory challenge is being abused, are facially race-neutral. The trial court must further evaluate the

proffered explanations in light of the standards we recognize here, other circumstances of the case, and the judge's knowledge of trial tactics in order to make a reasoned determination that the prosecutor's facially innocuous explanations are not contrived to avoid admitting acts of group discrimination.

Reversed and remanded for a new trial.

Slappy v. State

Case No. 85-1530

JORGENSON, Judge, concurring specially.

I agree that it is clear from this record that the trial court apparently considered itself bound to accept the

state's explanations of its peremptory challenges at face value. I also agree that a trial court is not so bound and, therefore, join in this reversal. I am reluctant, however, to approve the notion that, after a finding by a trial court (not present in this case) that a peremptory challenge was not racially motivated, we should engage in an analysis of the reasons offered by a party for the exercise of its challenges. The cold record that we review here does not, and cannot, provide the full flavor of the courtroom dynamic which only the trial judge is in a position to observe. Thus, a weak reason offered by a party for the exercise of a peremptory challenge may be supported by other criteria. See, e.g., Isaacs, Jury Selection:

Discovering the Hidden Agenda, 60 Fla. B.J. 21 (Dec. 1986). See also National Jury Project, Jurywork, Systematic Techniques (2d ed 1986).

This case and the others that are sure to follow involving improper use of peremptory challenges should serve as a basis for our supreme court to reduce the number of peremptory challenges available to the parties in criminal cases. A reduction in the number of peremptory challenges available would make them more valuable in the hands of the parties and reduce the need for this kind of review. See J. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Panels 169 (1977)(recommending reductions in number of available peremptory challenges).

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

JANUARY TERM, A.D. 1987

FRIDAY, MARCH 20, 1987

CASE NO. 85-1530

CHARLES SLAPPY, **

Appellant, **

vs. **

THE STATE OF FLORIDA, **

Appellee. **

Upon consideration, appellee's motion for rehearing is hereby denied.

A TRUE COPY

ATTEST

LOUIS J. SPALLONE

Clerk District Court of Appeal, Third District

By: Evelyn A. Hillman, Deputy Clerk,

cc: Charles M. Fahlbusch
Michael H. Tarkoff
/hb

SUPREME COURT OF FLORIDA

NO. 70,331

STATE OF FLORIDA, Petitioner,
vs.
CHARLES SLAPPY, Respondent.

[March 10, 1988]

BARKETT, J.

We have for review Slappy v. State, 503 So.2d 350 (Fla. 3d DCA 1987), based on express and direct conflict with Blackshear v. State, 504 So.2d 1330 (Fla. 1st DCA 1987). We have jurisdiction. Art. V, §3 (b)(3), Fla.Const. We approve the decision below.

The issue in this case is the appropriate procedure to follow when a claim of racial discrimination through the exercise of peremptory challenges has been raised.

Slappy, a black defendant, was tried for carrying a concealed firearm. Four of the state's six peremptory challenges were used to exclude blacks from the panel, although all four had indicated an ability to serve as fair and impartial jurors. After the fourth challenge, the defense objected and the following exchange then occurred:

> THE COURT: All right. At this particular juncture, Ms. Lumpkin is the fourth black juror excused by the state.
>
> State, why are you excusing Ms. Lumpkin?
>
> ASSISTANT STATE ATTORNEY: She said she thinks she knew [the defense counsel] from previously in her response. Whether or not she did or not did not-- I don't want someone on a defense--
>
> THE COURT: Why did you excuse Ms. Jordan.?

ASSISTANT STATE ATTORNEY: She didn't seem to be secure about sitting on a jury. She asked questions, I think, twice, whether or not she needs to known anything about the law or criminal justice system. Her health doesn't seem to be very good. I just didn't want someone like that on the jury.

THE COURT: How about Mr. Williams?

ASSISTANT STATE ATTORNEY: Both Mr. Williams and Mrs. Williams I excused because they're both teachers, assistant teachers, and both of them at elementary schools. That to me indicates a degree of liberalism that I prefer not have [sic] on a jury.

THE COURT: Liberalism?

ASSISTANT STATE ATTORNEY: Yeah, maybe more sympathetic to people who go astray than people who don't have to deal with kids in a classroom. Always getting into trouble.

DEFENSE COUNSEL: Of course. They accepted Mr. Farrar, who is also a teacher, and I excused him.

ASSISTANT STATE ATTORNEY: He was also in the army.

THE COURT: You never heard of liberals in the army?

ASSISTANT STATE ATTORNEY: I think you are less likely to find help in the military than elementary school.

503 So.2d at 352.

After this exchange, the trial court accepted the state's explanations and denied the motion to strike the panel. Id. On appeal, the Third District held that the trial court erroneously believed it was bound by the state's facially neutral explanations. The district court essentially found that these explanations were not supported by the record, and remanded for a new trial.

Despite continuing efforts, racial and other discrimination remains a fact

of this nation's evolving history. The United States Supreme Court has characterized it as a problem needing unceasing attention. McClesky v. Kemp, 107 S.Ct. 1756, 1775, rehearing denied, 107 S.Ct. 3199 (1987). As the Supreme Court elsewhere has noted:

> [W]e. . . cannot deny that, 114 years after the close of the War Between the States. . . ., racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious.
>
> Rosa v. Mitchell, 443 U.S. 545, 558-59 (1979).

One would think it unnecessary to point out again, as did the court in Batson v. Kentucky, 476 U.S. 79, 87-88 (1986)(citation omitted)(quoting

Strauder v. West Virginia, 100 U.S. 303, 308 (1879)), that "[d]iscrimination within the judicial system is [the] most pernicious." It would seem equally self-evident that the appearance of discrimination in court procedure is especially reprehensible, since it is the complete antithesis of the court's reason for being--to insure equality of treatment and evenhanded justice. Moreover, by giving official sanction to irrational prejudice, courtroom bias only enflames bigotry in the society at large.

The need to protect against bias is particularly pressing in the selection of a jury, first, because the parties before the court are entitled to be judged by a fair cross section of the

community, and second, because our citizens cannot be precluded improperly from jury service. Indeed, jury duty constitutes the most direct way citizens participate in the application of our laws.

Unfortunately, the nature of the peremptory challenge makes it uniquely suited to masking discriminatory motives. See Batson, 476 U.S. at 96. Traditionally, a peremptory challenge permits dismissal of a juror based on no more than "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another." 4 W. Blackstone, Commentaries 353 (1807). This ancient tradition, however, is to some degree inconsistent with the requirements of

the Florida and federal constitutions. We thus cannot permit the peremptory's use when it results in the exclusion of persons from jury service due to constitutionally impermissible prejudice. To the extent of the inconsistency, the constitutional principles must prevail, notwithstanding the traditionally unlimited scope of the peremptory.

In interpreting our own Constitution, this Court in State v. Neil, 457 So.2d 481 (Fla. 1984), clarified sub nom, State v. Castillo, 486 So.2d 565 (1986), recognized a protection against improper bias in the selection of juries that preceded, foreshadowed and exceeds the current

federal guarantees.[1] We today reaffirm this state's continuing commitment to a vigorously impartial system of selecting jurors based on the Florida Constitution's explicit guarantee of an impartial trial. See Art. I, §16, Fla.Const.

Despite this commitment, much litigation has arisen over its application to the facts of particular voir dire examinations. As in this case, one of the most frequently litigated issues in both the federal and state courts is the burden of proof, its

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[1] Hall followed the adoption of a similar standards in California, People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 148 Cal.Rptr. 890 (1978), Massachusetts, Commonwealth v. Soares, 377 Mass. 461, 387 N.E. 2d 499, cert. denied, 444 U.S. 881 (1979), and New York, People v. Thompson, 79 A.D. 2d 87, 435 N.Y.S. 739 (1981).

nature and who must bear it. See Batson, 476 U.S. at 90; Whitus v. Georgia, 385 U.S. 545, 550 (1967); Hernandez v. Texas, 347 U.S. 475, 478-81 (1954); Akins v. Texas, 325 U.S. 398, 403-04, rehearing denied, 326 U.S. 806 (1945); Martin v. Texas, 200 U.S. 316 (1906); State v. Jones, 485 So.2d 1283 (Fla. 1986); Pearson v. State, No. 85-2945 (Fla. 2d DCA Sept. 4, 1987); Floyd v. State, No. 85-2087 (Fla. 3d DCA Sept. 1, 1987); Blackshear; Kibler v. State, 501 So.2d 76 (Fla. 5th DCA 1987).

This Court early had recognized the impossible burden imposed by Swain v. Alabama, 380 U.S. 202, rehearing denied, 381 U.S. 921 (1965), which had required a defendant to show discriminatory practices employed systematically in a

number of similar cases or contexts. In Neil, therefore we established the following test:

> A party concerned about the other side's use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race.

457 So.2d at 486 (based on art. I, §16, Fla.Const.)(footnote omitted).

Unfortunately, deciding what constitutes a "likelihood" under Neil does not lend itself to precise definition. It is impossible to anticipate and articulate the many scenarios that could give rise to the inference required by Neil and Batson. We know,

for example, that number alone is not dispositive, nor even the fact that a member of the minority in question has been seated as a juror or alternate. United States v. Gordon, 817 F.2d 1538, 1541 (11th Cir. 1987); United States v. David, 803 F.2d 1567, 1571 (11th Cir. 1986); Fleming v. Kemp, 794 F.2d 1478 (11th Cir. 1986); Neil; Pearson; Floyd. Indeed, the issue is not whether several jurors have been excused because of their race, but whether any juror has been so excused, independent of any other. This is so because

> the striking of a single black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when there are valid reasons for the striking of some black jurors.

Gordon, 817 F.2d at 1541. Accord,

David; Fleming; Pearson; Floyd. As the Eleventh Circuit has stated;

> Batson restates the principle that "'[a] single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.'" Batson, supra, 106 S.Ct. at 1722, quoting Arlington Heights v. Metropolitan Housing [Development] Corp., 429 U.S. 252, 266 n. 14, 97 S.Ct. 555, 564 n. 14, 50 L.Ed.2d 450 (1977).

Fleming, 794 F.2d at 1483. Accord Pearson.

We nevertheless resist the temptation to craft a brightline test. Such a rule could cause more havoc than the imprecise standard we employ today, since racial discrimination itself is not confined to any specific number of forms or effects. Instead, we affirm

that the spirit and intent of Neil was not to obscure the issue in procedural rules governing the shifting burdens of proof, but to provide broad leeway in allowing parties to make a prima facie showing that a "likelihood" of discrimination exists. Only in this way can we have a full airing of the reasons behind a peremptory strike, which is the crucial question. Recognizing, as did Batson, that peremptory challenges permit "those to discriminate who are of a mind to discriminate," 476 U.S. at 96, we hold that any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor. If we are to err at all, it must be in the way least likely to allow discrimination.

Once a trial judge is satisfied that the complaining party's objection was proper and not frivolous, the burden of proof shifts. At this juncture, Neil imposes upon the other party an obligation to rebut the inference created when the defense met its initial burden of persuasion. This rebuttal must consist of a "clear and reasonably specific" racially neutral explanation of "legitimate reasons" for the state's use of its peremptory challenges. Batson, 476 U.S. at 96-98 & n. 20. While the reasons need not rise to the level justifying a challenge for cause, they neverthcless must consist of more than the assumption

> that [the veniremen] would be partial to the defendant because of their shared race.... Nor may the [party exercising the challenge] rebut

> the defendant's case merely by denying that he had a discriminatory motive or "affirming his good faith in inidividual selections.". . . If these general assertions were accepted as a rebutting a. . . prima facie case, the Equal Protection Clause "would be but a vain and illusory requirement."

Id. at 97-98 (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972), and Norris v. Alabama, 294 U.S. 587, 598 (1935)). Part of the trial judge's role is to evaluate both the credibility of the person offering the explanation as well as the credibility of the asserted reasons. These must be weighed in light of the circumstances of the case and the total course of the voir dire in question, as reflected in the record.

We agree with the district court below that a judge cannot merely accept

the reasons proffered at face value, but must evaluate those reasons as he or she would weigh any disputed fact. In order to permit the questioned challenge, the trial judge must conclude that the proffered reasons are, first, neutral and reasonable and, second, not a pretext. These two requirements are necessary to demonstrate "clear and reasonably specific. . . legitimate reasons." Batson at 98 n. 20. Moreover, they serve the goal of demonstrating a "neutral explanation related to the particular case to be tried," Id. at 98, and that "the questioned challenges were not exercised solely because of the prospective jurors' race." Neil, 457 So.2d at 486-87 (footnote omitted).

These requirements lie at the heart of the nonexclusive list of five factors the Slappy court concluded would weigh against the legitimacy of a race-neutral explanation. 503 So.2d at 355. We agree that the presence of one or more of these factors will tend to show that the state's reasons are not actually supported by the record or are an impermissible pretext: (1) alleged group bias not shown to be shared by the juror in question, (2) failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror, (3) singling the juror out for special questioning designed to evoke a certain response, (4) the prosecutor's reason is unrelated to the facts of the case, and (5) a challenge based on

reasons equally applicable to juror who were not challenged. See Id.

We recognize the great responsibility and discretion this issue reposes in trial judges and caution both judges and litigants against the dangers observed by Justice Marshall in his concurring opinion in Batson:

> Nor is outright prevarication... the only danger here. "[I]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal." . . . A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. . . . [P]rosecutors' peramptories [sic] are based on

> their "seat-of-the-pants instincts." . . . Yet "seat-of-the-pants instincts" may often be just another term for racial prejudice. Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels. . . .

Batson, 476 U.S. at 106 (Marshall, J. concurring)(citations omitted).

Turning now to the facts of this case, we find that the Third District reached a result in harmony with Batson, Neil and article I, section 16 of the Florida Constitution. The defense called the court's attention to a pattern of using peremptory challenges to exclude jurors of a cognizable minority who had indicated no impartiality or unfairness, and whom the state had failed even to question. This

showing was sufficient of itself to require explanation, and thus shifted the burden to the state to present specific reasons based on the jurors' responses at voir dire or other facts evident from the record. Jones. Recognizing this requirement, the trial court properly conducted an inquiry on the question.

However, we hold that the state's explanation failed to satisfy its burden of proof.

As to the first requirement in this instance, we agree that the state demonstrated that "liberalism" was neutral and reasonable. The prosecutor argued that political liberals were more likely to be lenient to defendants than

conservatives, and thus less favorable to the state's position at this particular trial. Although others might argue, as does this petitioner, that liberals also are more likely to convict someone for violating gun-control laws, we do not believe the state's assertion should be set aside merely because opinions may differ among reasonable men. The function of the trial court in determining the existence of reasonableness is not to substitute its judgment for that of the prosecutor, but merely to decide if the state's assertions are such that some reasonable persons would agree.

However, reasonableness alone is not enough, since the state also must demonstrate a second factor--record

support for the reasons given and the absence of pretext. Thus, where the total course of questioning of all jurors shows the presence of any of the five factors listed in Slappy and the state fails to offer convincing rebuttal, then the state's explanation must be deemed a pretext. In the present case, the utter failure to question two of the challenged jurors on the grounds alleged for bias, 503 So.2d at 355, renders the state's explanation immediately suspect.[2] Moreover, we cannot accept the state's contention that all elementary school assistants, and these two in particular, were liberal. If they indeed possessed this

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[2] The rule in Neil would be meaningless indeed if, by simply declining to ask any questions at all, the state could excuse all blacks from the venire.

trait, the state could have established it by a few questions taking very little of the court's time.[3]

We find that, when the state engages in a pattern of excluding a minority without apparent reason, the state must be prepared to support its explanations with neutral reasons based on answers provided at voir dire or otherwise disclosed on the record itself. This requirement helps ensure procedural regularity and racial neutrality. By failing to ask any questions, the state failed to

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[3] Similarly, the state excused another black juror at least partly because of purported ill health, although the record is far from clear that any such characteristic existed. A single question posed to the juror could have established the existence of nonexistence of illness.

demonstrate that the alleged "liberalism" of these two jurors actually existed. Although the trial court's findings are entitled to deference on appeal, Batson, 476 U.S. at 98 n. 21, the district court essentially determined that the state's explanation was not supported by the record. Since we also find no record basis for the state's explanation, we do not disturb the district court's finding.

We thus must find reversible error even though the final jury panel apparently contained one black. See David, 803 F.2d at 1571; Fleming. Accord United States v. McDaniels, 379 F.Supp. 1243, 1244 (E.D. La. 1974); Commonwealth v. Soares, 377 Mass. 461, 473, 387 N.E.2d 499, cert. denied, 444

U.S. 881 (1979); People v. Seals, 153 Ill.App. 3d 417, 505 N.E. 2d 1107, 1111 (Ill.App. 1987). This result is consistent with Neil, where we found error even though a black served as an alternate juror. 457 So.2d at 483.

For the reasons herein, we approve the decision of the Third District.

It is so ordered.

EHRLICH, SHAW and GRIMES, JJ., Concur

MCDONALD, C.J., Dissents with an opinion, in which OVERTON, J., Concurs

MCDONALD, C.J., dissenting.

First, I want to emphasize that I believe in the tenets of State v. Neil, 457 So.2d 481 (Fla. 1984). The

indiscriminate excusals of blacks from juries through the peremptory challenge process has no place in Florida's jurisprudence. This does not mean, however, that a black person is immune from being peremptorily struck or that artificial or unreasonable barriers should be erected to judge and review the use of peremptory strikes. Admittedly, fair and reasonable criteria to assure that persons are being excused for reasons other than race are difficult to formulate. It is the trial judge's responsibility to inquire and evaluate the reasons. The judge is then to use his reasoned judgment in deciding whether the challenge is being made solely because of the prospective juror's race.

In this case the trial judge knew of Neil. He made the inquiry. He was satisfied that good reasons, other than race, existed. His rulings should not be vacated unless there is evidence that he abused his discretion in the evaluation process. This is not shown in this case. Further, we need to be careful to avoid a mini-trial in the jury selection process. I believe the majority opinion may lead to that.

OVERTON, J., Concurs

Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decision Third District - Case No. 85-1530

Robert A. Butterworth, Attorney General and Charles M. Fahlbusch, Assistant Attorney General, Miami, Florida, for Petitioner, Michael H. Tarkoff of Flynn and Tarkoff, Miami, Florida, for Respondent.